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No. 96-177

In the
Supreme Court of the United States
October Term, 1995

R. RAY SINGLETON,

Petitioner,

vs.

CHRIST THE SERVANT EVANGELICAL LUTHERAN CHURCH, and THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

JEREMIAH OLSON,

Petitioner,

vs.

LUTHER MEMORIAL CHURCH, AND THE ST. PAUL AREA SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the decision that the Establishment Clause bars civil review of a hierarchical church's relationship with its minister which would require interpretation of organic internal documents governing church polity.

2. Whether the limited neutral principles exception to determine property disputes between church factions is applicable to this ecclesiastical dispute between a hierarchical Church and its minister.

3. Whether this Court may review Petitioner's Due Process and Equal Protection Arguments neither presented to nor passed upon by state courts below.

4. Whether Due Process and Equal Protection arguments should be summarily dismissed on the strength of First Amendment protection against civil intrusion into church governance and polity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Respondent Luther Memorial Church prays that this Court decline to grant a writ of certiorari and refuse to review the Order of the Minnesota Court of Appeals which affirmed the summary judgment of the District Court for Ramsey County, Minnesota, in favor of Luther Memorial Church in the case of Olson v. Luther Memorial Church, and St. Paul Area Synod of the Evangelical Lutheran Church in America.

OPINION BELOW

In Jeremiah Olson v. Luther Memorial Church, a Minnesota Religious Corporation, and the St. Paul Area Synod of the Evangelical Lutheran Church in America, (hereinafter referred to as Olson), the Minnesota Court of Appeals affirmed the District Court's Opinion on February 20, 1996. The Minnesota Court of Appeals upheld the District Court's dismissal of Petitioner Olson's claims by finding review would involve excessive entanglements in matters of church governance. Further, it affirmed the District Court on several of Petitioner Olson's claims because there were no genuine issues of material fact. PA at E-2. The Minnesota Supreme Court denied Petitioner Olson's Petition for Review by Order dated March 19, 1996. PA at F-1.

STATEMENT IN OPPOSITION TO JURISDICTION

As stated above, the Minnesota Supreme Court denied the Petition for Review by Order dated March 19, 1996. PA at E-2 and F-1. Pursuant to Rule 13 of the Supreme Court Rules, the Petitioners' combined petition for writ of certiorari must be filed within 90 days after entry of those Orders which denied discretionary review.

Upon information and belief, the Petition for Certiorari may not have been served in a timely manner upon the Clerk of the Supreme Court. Certainly, the Affidavit of Personal Service upon this counsel is incorrect in that it alleges personal service was made upon counsel for Luther Memorial Church on June 17, 1996. In fact, personal service was made one day later on June 18, 1996, which was more than 90 days following the Minnesota Supreme Court Order denying discretionary review. As a result, timeliness of the service upon the Court is also suspect.

Pursuant to 28 U.S.C. § 1257, this Court may review the Order of the Minnesota Court of Appeals and issues considered by the Court in that Order. Supreme Court precedent and corresponding Minnesota case law require parties to raise issues at lower courts before they may be reviewed at the appellate level. Here, the Petitioner has raised new and additional arguments based upon Due Process and Equal Protection which were neither presented nor argued to the Minnesota courts. As a result, this Court has no jurisdiction to consider Petitioner's new and additional theories founded upon Due Process and Equal Protection. Alternatively, based upon considerations of comity and practicality, this Court should not review the new and additional theories raised for the first time.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, § 16 of the Minnesota Constitution states:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with

the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

STATEMENT OF THE CASE

Petitioner Jeremiah Olson ("Olson") began his duties as Assistant Pastor at Luther Memorial Church ("the Church") on August 1, 1990, pursuant to a "call letter" issued by the Church. A letter of call is an ecclesiastical offer of employment from a congregation to the pastor.[1] The call was to continue as long as the Pastor and the congregation mutually agreed and was therefore an "at will" employment relationship. In attachments to the letter of call, the congregation sets forth the duties and responsibilities it expected, as well as a statement of the congregation's financial and other commitments to the Pastor. Olson was free to accept or reject the letter of call.

He hesitated to accept the Church's call primarily because he thought he wasn't being offered enough money. In fact, just

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[1] The Letter of Call begins:

> In the Name of the Father, and of the Son, and of the Holy Spirit, Amen. Jeremiah Olson, with prayers for the guidance of the Holy Spirit to do God's will, Luther Memorial Church, at a meeting held on July 1, 1990, called you to serve as Assistant Pastor of Life and Growth of Luther Memorial Church. We call you to exercise the office of the Word and Sacrament in a mutual relationship....for the sake of our ministry in Christ's name.

two months after he accepted the call, at the Church's annual budgetary meeting, Olson informed the congregation that his pay wasn't up to Synod guidelines. This event paints the financial picture of Olson's tenure at the Church.

Olson also felt that the Senior Pastor, Tom Burtch, was hostile to him. Shortly after he began his duties, Olson claims he became aware of a number of rumors concerning Pastor Burtch. Although Olson was less than clear in his deposition, apparently there were allegations that Pastor Burtch had homosexual relations, that he had sold drugs and liquor to underage boys, that he used alcohol to excess, and that he had used illegal drugs. This conduct supposedly occurred many years ago. However, Olson also insinuated that some of this behavior was continuing. He expressly made clear that he had no personal knowledge of the truth of these rumors and never witnessed any of the reported misbehavior. Olson acted on unsubstantiated rumor--a rumor so tenuous that he did not believe it triggered state statutory reporting requirements.

Olson reported the rumors of Pastor Burtch's misconduct to Synod Bishop Lowell Erdahl. Olson believed that Bishop Erdahl inappropriately refused to act upon his report, so he took the rumors to the Bureau of Criminal Apprehension ("BCA"). The BCA contacted Dakota County authorities who investigated the allegations. The investigation could substantiate none of the alleged illegal activity.

In October 1992, the Church found itself in the midst of an extreme financial crisis. Expenses had exceeded receipts by over $30,000.00 for the 1991-92 fiscal year. The Church had negative balances in its general checking account in five of the nine financial quarters Olson was an Assistant Pastor. In total, the working funds available to the Church, which are its general checking account and contingency monies, declined from a total of approximately $39,500.00 in August 1990 to $7,500.00 by October 1992.

The budget had to be cut to staunch the flow of red ink. The Board of Trustees reviewed the budget and determined that the Assistant Pastor position was a luxury the congregation could no longer afford. It presented a resolution to the congregation recommending elimination of that position. Although Olson will not believe that the Church faced a financial crisis, he has never challenged the validity of the data assembled by the Board of Trustees.

At a regularly scheduled congregational meeting held on October 18, 1992, the congregation voted to eliminate the position of Assistant Pastor.[2] The Church has not recreated the position of Assistant Pastor and has no plans to do so.

On October 25, 1992, Olson left the pulpit in the middle of his sermon and did not return. The Church offered him a severance package which Olson accepted and received for approximately one year. From February 14, 1993, through the summer of 1994, Olson worked as an Interim Pastor for First Lutheran Church of Harris, Minnesota. In August of 1994, Trinity Lutheran Church of Minnehaha Falls, in Minneapolis, extended a call to Olson, which he accepted.

Despite the Church's uncontroverted financial situation, Olson does not accept that his position was eliminated due to budgetary constraints and brought this lawsuit in Ramsey County District Court. He claimed breach of contract against both the Synod and the Church. He also asserted claims against the Church for wrongful discharge, promissory estoppel, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, violation of the Minnesota "Whistleblower" statute and negligent hiring and retention.

Although Olson lists claims other than his breach of contract claim in his petition for writ of certiorari, he does not

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[2] This vote taken was to eliminate the position rather than fire the person in that position.

discuss any claims other than breach of contract. For that reason, the Church will only respond to the breach of contract discussion presented. Nevertheless, the Church asserts that the state court was correct in its entire decision on all of the issues raised below.

REASONS TO DENY THE PETITION FOR WRIT

The state decision below in Olson is based upon well-established precedent from this Court regarding the interplay between the Establishment Clause and civil jurisdiction. Those cases expressly state that civil courts may not inquire into or review the relationship between a hierarchical church and its minister where such review would require an in-depth investigation into the church's internal governance and polity. Any violations of public policy or other improperly raised constitutional argument by Petitioners necessarily must yield to the overarching and fundamental doctrine of separation of church and state.

I. THE ESTABLISHMENT CLAUSE BARS CIVIL REVIEW OF A HIERARCHICAL CHURCH'S RELATIONSHIP WITH ITS MINISTER WHICH REQUIRES INTERPRETATION OF INTERNAL DOCUMENTS GOVERNING CHURCH POLITY

Based upon well-founded precedent from this Court, the state court below held that the Establishment Clause of the First Amendment bars civil review of Olson's claims because such a review would necessarily excessively entangle the state into internal Church governance and polity. The great weight of precedent and corresponding constitutional analysis show that the lower court's decision was proper. The First Amendment and the Minnesota Constitution bar civil review

of Olson's claims.[3] As a result, this Court should not exercise its discretionary review over this case.

The First Amendment necessarily limits civil review of religious disputes in order to maintain a "wholesome `neutrality'" between church and state. School District of Abington Township v. Schepp, 374 U.S. 203, 222 (1963). In Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), the Supreme Court outlined a three-part test to determine whether governmental action by the state violates the Establishment Clause of the First Amendment[4]. A governmental action must have a secular purpose and it cannot advance religion, inhibit religion, or foster "excessive government entanglement" with religion in order to be constitutionally valid. Id. at 612-13.

This case presents the question of civil review of the Church's determination of who will preach from its pulpit. The very nature of the issue presented demonstrates that any civil review of the Church's decision and process of eliminating the position of Assistant Pastor would cause precisely the excessive state entanglement into church governance which prohibited by the First Amendment. Questions revolving around the employment of a minister by a church are especially protected, because the decision of who will occupy the minister's position is "of prime ecclesiastical concern" and civil review "could only produce by its coercive effect the very

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[3] The Minnesota Constitution provides for greater protection for religious liberties against governmental action than the Federal Constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In State by Cooper v. French, 460 N.W.2d 2, 8-9 (Minn. 1990), the court stated that the "Minnesota Constitution, unlike the United States Constitution, treats religious liberty as more important than the formation of government." This provision alone should bar review.

[4] The First Amendment is applicable to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

opposite of that separation of church and state contemplated by the First Amendment." McClure v. Salvation Army, 460 F.2d 553, 558-60 (5th Cir. 1972), cert. den., 409 U.S. 896 (1972).

Civil review of intra-church disputes is curtailed even further when a hierarchical church is involved. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-709 (1976). In Milivojevich, the Court held that the First and Fourteenth Amendments prevent civil courts from deciding breach of contract claims such as Olson's that would require "extensive inquiry into [the] religious law and polity" of a hierarchical Church. Id. at 709. Judicial review would require an impermissible intrusion into the procedures, canon law, ecclesiastical law, or substantive criteria by which the church decides its ecclesiastical concerns. Id. at 713. If civil courts attempted make those determinations, they would "deprive [churches] of the right of construing their own church laws." Id. at 714.

The Court's analysis and holding in Milivojevich have been followed throughout the country. For example, in Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994), the court held that civil "review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring and firing of clergy, are themselves an 'extensive inquiry' into religious law and practice, and, hence forbidden by the First Amendment." 21 F.3d at 187 (emphasis added). The court in Hafner v. Lutheran Church-Missouri Synod, 616 F.Supp. 735, 738-39 (N.D. Ind. 1985), also followed precedent when it dismissed the minister plaintiff's claims for breach under the Synod constitution and stated:

> If the plaintiffs are correct it will become the function of this court to interpret that provision of the church constitution. Such an inquiry is the kind of inquiry

> that was requested of and rejected by the Supreme Court in the Serbian Eastern Orthodox Diocese case . . . A superficial and cursory examination of the Constitution of the Lutheran Church-Missouri Synod demonstrates beyond question that it is basically and fundamentally a religious doctrine. Indeed, it is the organic document of the church.

616 F.Supp. at 737-39 (citations omitted).

Again, the holding of Milivojevich was also followed in the Eighth Circuit's decision in Drevlov v. Lutheran Church, Missouri Synod, 991 F.2d 468, 470-71 (8th Cir. 1993), where the Court held that it had no jurisdiction to review a Church's personnel decision "where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical law."

On our facts and by application of the definition found in Milivojevich, it is plain that Luther Memorial Church is a hierarchical church.[5] The state court properly applied Milivojevich and its progeny. Based on that analysis, the lower court held that the inquiry required by Olson's claims is precisely the type of intrusion which is prohibited by the First Amendment.

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[5] For additional discussion of hierarchical versus congregational churches, see Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994); Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America, 860 F.Supp. 1194, 1195-96 (W.D. Ky. 1994), aff'd, 64 F.3d 664 (6th Cir.); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 110 (1952); Watson v. Jones, 80 U.S. (13 Wall.) at 724-25; Burgess v. Rock Creek Baptist Church, 734 F.Supp. 30, 31 n. 2 (D.D.C. 1990); and First Baptist Church of Glen Este v. State of Ohio, 591 F.Supp. 676, 681-82 (S.D. Ohio 1983).

This Court should let the state decision stand. As in Milivojevich, civil review of the substance and merits of Olson's claims would impermissibly require excessive entanglements between the civil courts and internal Church matters of ecclesiastical concern. From the date he filed suit against the Church, Olson has maintained that he was "terminated" and that said termination did not comply with the termination procedures set allegedly forth in the Church and Synod Constitutions. However, Olson has never presented a single provision of any internal church document relating to the elimination of an Assistant Pastor position.

A court reviewing this case would first have to determine whether there is any internal church provision relating to the elimination of a position, compare it to the facts at hand determine even if it or the provisions allegedly violated by the Church apply. Again, this exhaustive review and excessive entanglement is exactly the type of intrusion that the First Amendment was drafted to avoid.

For these reasons, this Court should deny discretionary review and let the state court decision in Olson stand. Any other decision will force the Church to bow to a secular court's interpretation of religious documents and procedure. That result would encourage the erosion of Church authority in internal ecclesiastical matters including church polity, governance and administration. The resulting relationship between the state and Church leaves the Church less able to govern itself and practice its faith. See Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985), cert. den. 478 U.S. 1020 (1986).

Finally, and despite Olson's contentions, courts throughout this nation have followed Supreme Court precedent and held that they may not review hierarchical clergy-church employment disputes.[6] The fundamental policy

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[6] See e.g., Yaggie, 860 F.Supp. at 1195-1196; Crowder v. Southern Baptist Convention, 828 F.2d 718, 724-26 (11th Cir. 1987), cert. den.,

underlying those decisions is that the secular state must be kept out of intra-church religious matters.

II. LIMITED NEUTRAL PRINCIPLES EXCEPTION TO DETERMINE PROPERTY DISPUTES BETWEEN CHURCH FACTIONS IS NOT APPLICABLE TO DISPUTE BETWEEN HIERARCHICAL CHURCH AND ITS MINISTER

While Thomas Jefferson spoke of a "wall of separation"[7] between church and state provided by the First Amendment, limited state intervention into some church activities is occasionally permitted. For example, churches must comply with fire inspections and zoning regulations. Lemon, 403 U.S. at 614.

These rare exceptions are justified only if there are compelling governmental interests affecting public health, safety or the general welfare. Id. Even so, incursions are only cautiously permitted where they influence a religious community's internal beliefs and decisions. Thomas v. Collins, 323 U.S. 516, 530 (1945) ("only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."); Sherbert v. Verner, 374 U.S. 398, 406 (1963);

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484 U.S. 1066 (1988); Rayburn, 772 F.2d at 1167-68; Granfield v. Catholic Univ. of America, 530 F.2d 1035, 1047 (D.C. Cir. 1976), cert. den., 429 U.S. 821 (1976) (determination of priest salaries was an internal religious matter into which a civil court had no ability to inquire); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989); Kaufmann v. Sheehan, 707 F.2d 355, 358-59 (8th Cir. 1983); EEOC v. The Catholic Univ. Of Amer., 856 F.Supp. 1 (D.C.Cir. 1994); Knuth v. Lutheran Church, Missouri Synod, 643 F.Supp 444, 447-48 (D. Kan. 1986).

[7] Discussed in People of State of Illinois v. Board of Education, Etc., 333 U.S. 203, 244 n. 8 (1948).

Simpson v. Wells Lamont Corp., 494 F.2d 490, 492-93 (5th Cir. 1974); Yaggie, 860 F.Supp. at 1198.

The Supreme Court has determined that a court may use "neutral principles of law" to resolve church property disputes. Maryland and Virginia Eldership of the Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970); Presbyterian Church in the United States v. Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Jones v. Wolf, 443 U.S. 595, 602 (1979). However, unlike Petitioners' broad-brushed assertions, this "neutral principles" exception is narrowly applied only in fact situations very different that those before the Court. Indeed, the exception is most often applied to congregational schisms of non-hierarchical churches in claims involving property disputes. See e.g. Hutchinson v. Thomas, 789 F.2d 392, 396 (6th Cir. 1986) cert. den. 479 U.S. 885 (1986)("neutral principles" exception applies only to church property).

Olson's reliance on Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) for the authority that neutral principles of law allow civil courts to review his dispute with the Church is misplaced. As noted by the state court below, the facts in Minker differ from those in Olson in that the decision was made on a motion to dismiss rather than a motion for summary judgment, Minker at 1356, and even the court in Minker noted that it would be difficult for the plaintiff to avoid summary judgment. Id. at 1360.

Minnesota state courts have used the "neutral principles" doctrine to determine intra-church disputes where the issues presented are unrelated to church doctrine or church governance. However, Minnesota courts give substantial deference in ecclesiastical matters. Piletich v. Deretich, 328 N.W.2d 696, 699-700 (Minn. 1982); Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991), rev. den. (Minn. Aug. 29, 1991); Schoenhals v. Mains, 504 N.W.2d 233, 235 (Minn.

Ct. App. 1993). Of course, there is no greater ecclesiastical and more protected decision than who is the minister of a hierarchical church. Milivojevich, 426 U.S. at 713; Young, 21 F.3d at 187.

Despite Olson's argument, the case of Black v. Snyder does not support to Olson's argument that neutral principles of law may be applied to this situation. In fact, the court in Black specifically declares that civil review into church doctrine and governance is prohibited by conducting the analysis required by Milivojevich. 471 N.W.2d at 720. Olson's reliance on the decision in Blauert v. Schupmann, 241 Minn. 428, 63 N.W.2d at 578 (1954), is similarly misplaced. The Blauert decision was made before this Court determined in Milivojevich that the First Amendment barred a bishop's wrongful discharge claim. 426 U.S. at 721-3. The Blauert decision was also limited by the Minnesota Supreme Court's analysis in Piletich, 328 N.W.2d at 701, and was differentiated by the Olson court below.

Just one of the cases cited by Olson squarely demonstrates the reasons why the neutral principles doctrine may not be applied. In General Council on Fin. and Admin. of the United Methodist Church v. Superior Court, 439 U.S. 1355, 1356, 99 S.Ct. 35, 36 (1978), this Court was presented with an interlocutory petition for discretionary review from a California court. Some 1,950 past and present residents of hospitals and convalescent homes operated by an alleged alter-ego of the United Methodist Church brought claims for fraud, breach of contract, and violations of California securities laws against the United Methodist Church. Id.

The Church's unsuccessful argument on petition for writ of certiorari was that civil determination of the structure and operation of a hierarchical church for personal jurisdiction analysis violated the First and Fourteenth Amendments. Id. at 1370. In response, the Court, per Justice Rehnquist as Circuit Justice, denied the petition for writ, and stated:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating **intrachurch** disputes. See Serbian Eastern Orthodox Diocese v. Milivojevich. **But this Court has never suggested that those constraints similarly apply outside the context of such intraorganization disputes.** Thus Serbian Eastern Orthodox Diocese and the other cases cited by applicant are not on point.

Id. at 1372 (emphasis added).

In sharp contrast to the General Council situation, here there are no purely secular third-parties involved who have asserted fraud claims against the religious organization. Indeed, this case presents an intrachurch employment dispute between a church and its minister involving purely ecclesiastical issues based upon organic religious documents such as the Church constitution. Therefore, unlike Petitioners' assertions, this Court has not endorsed any other circumstances permitting State intrusion into intrachurch employment relationships between a Church and its minister based upon "neutral principles of law." That has not happened because in such a critical issue of church polity and governance, any inquiry would fail the Lemon test for excessive entanglements in a religious matter.

Moreover, none of the cases cited by Olson as conflicting with the state's decision in Olson are sufficiently similar on their facts to create controversy or demonstrate a clash of analysis with the decision below. For example, in Gilespie v. Elkins Southern Baptist Church, 350 S.E.2d 175, 718 (W.Va. 1986), Robinson v. Davis, 511 N.Y.S.2d 311 (1987), and Tibbs v. Kendrick, 637 N.E.2d 397 (Ohio Ct. App. 1994), the courts were faced with disputes between pastors and their

congregational churches. The crucial difference between the decision in Olson and these cases is the type of church organization involved.

Unlike the facts of Olson, the pastors in those cases had no intrachurch process or avenue in which to pursue their concerns. Indeed, the Gilespie court itself states "we would hesitate to find that the trial court had jurisdiction at the time the suit was filed if the Church were a part of a hierarchical church structure...." Gilespie, 350 S.E.2d at 718. In comparison, this case involves a hierarchical church where Olson simply chose to "opt out" the review processes and appeals available to him through the hierarchical arrangement of the Church and Synod.

Similarly, the facts of Bacher v. Metcalf, 611 So.2d 1030 (Ala. 1992) cited by Petitioners as support for the alleged split in state courts on this issue, are dramatically different than those in Olson. The facts of Bacher are quite similar to that of Piletich v. Deretich, 328 N.W.2d 696, 699-700 (Minn. 1982), where the church congregation divided into factions and could not determine for itself the proper course of action. Paralleling the facts in Piletich, the congregation in Bacher, split itself into factions, took different votes and as a result, came up with different outcomes eventually requiring an accounting of church funds. Bacher, at 1030-1031. The courts found they could review this matter.

Again, the facts of Olson are quite different from Bacher and Piletich. The congregation in Olson remained as a unit and did not "splinter" into factions. Furthermore, there is no mention of any hierarchical review process in either Piletich or Bacher, a process which was undisputedly available in Olson.

Finally, the holdings in Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578, 579-580 (Id. Ct. App. 1994), and Feldbin v. Temple Beth-El of Manhattan Beach, 620 N.Y.S.2d 113, 114 (1994) should not be considered contradictory to the state's decision in Olson. Simply put, there are insufficient

underlying facts in the decisions to make a comparison valuable. For example, neither courts make any determination as to the congregational or hierarchical structure of the organizations involved.

From the above, this Court should determine that the "neutral principles of law" arguments asserted by Olson in his petition for writ of certiorari do not rise to the level of issue this Court must address. As a result, Olson's petition should be denied.

III. THIS COURT MAY NOT CONSIDER OLSON'S DUE PROCESS AND EQUAL PROTECTION ARGUMENTS WHICH WERE NEITHER PRESENTED TO NOR PASSED UPON BY STATE COURTS

On petition for writ of certiorari, this Court has jurisdiction only over issues which were presented to, considered or decided to the state courts below. Wilson v. Cook, 327 U.S. 474, 483-484, 66 S.Ct. 663, 667-668 (1946); Exxon Corp. v. Eggerton, 462 U.S. 176, 103 S.Ct. 2296, 2300 n. 3 (1983); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 60 S.Ct. 670, 672 (1940); Clark v. Jeter, 486 U.S. 456, 458-461, 108 S.Ct. 1910, 1913 (1988). This jurisdictional rule was established very early in the history of the court. See Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162 (1969) (citing Crowell v. Randell, 10 Pet. (35 U.S.) 368, 9 L.Ed. 458 (1836)). The rule prohibits the Court from deciding federal constitutional issues not previously raised at the state level.

The provisions of the rule are codified in 28 U.S.C. § 1257(a), which provides that this Court may review final judgments or decrees rendered by the highest court of a State in which a decision could be had involving federal claims. Moreover, the jurisdictional nature of the rule and its effect is

also recognized and enforced by the Court in Supreme Court Rules 14.1(e) and 14.1(g), which require a party to state where the questions presented for review were raised, the method and manner in which they were raised and the way in which they were "passed upon" by the courts. By operation of Rule 15(4) of the Supreme Court Rules, the Church was unable to bring any motion or objection to jurisdiction other than through this brief.

After review of these policy concerns and the Court's often-repeated requirements and Rules, it is clear that the Petitioners' petition for writ of certiorari is deficient because it fails to detail the Court's jurisdictional requirements by omitting that its Due Process and Equal Protection arguments were never raised in state court proceedings.

Despite the jurisdictional effect of the rule as stated above, it should be noted that later cases from this Court have demonstrated that the jurisdictional effect of the "not pressed or passed upon below" rule is in a state of flux. The court recently described this rule as "prudential" rather than jurisdictional in nature. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983); Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 80, 78-799, 108 S.Ct. 1645, 1650-1651 (1988).

There are powerful policy considerations underlying this jurisdictional rule which is described as the "pressed or passed upon below" rule. See Webb v. Webb, 451 U.S. 496, 498-499, 101 S.Ct. 1889, 1893 (1981). Those considerations range in weight, but in the whole, they demand that this court review only those issues which have been raised at lower courts. First, the principle of comity requires that this Court give proper respect for state functions in the federal system. Webb, 451 U.S. at 498-99. That principle requires that the state courts be allowed to perform their duties before federal courts address those issues even if the litigation centers upon federal issues. Id. It is "similar to the principle that stands behind the exhaustion-of-state-remedies doctrine" which is

applied in federal habeas corpus cases of state prisoners. Id. (citing Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971)).

Practicality considerations make up the second reason behind the requirement that state courts review claims before this Court. Webb 451 U.S. at 500, 1894 S.Ct. at 1894. Earlier review by lower courts allows the parties to develop the record necessary to adjudicate the issue at the appellate level. It allows the states to construe state statutes to avoid or obviate the need to invoke federal constitutional concerns and ensures that if there are "independent and adequate state grounds" that would determine an issue, those grounds would be used to support a decision rather than federal constitutional theory. Id. Finally, it gives state courts the ability to adjudicate federal claims to dispose of the case, which in turn, reduces the workload of this Court. Id. 451 U.S. at 501.

The facts underlying the discussion found in Illinois v. Gates, 462 U.S. at 216-224, are particularly helpful in demonstrating this point. In Illinois v. Gates, the Court was presented with a search and seizure argument and asked the parties to brief a constitutional theory not argued before it. Id. at 217. The Court decided "with apologies to all" that the issue upon which it requested briefing was not properly before it and therefore did not address that theory in its decision. Id. Here, the parties should be able to avoid the additional and eventually unnecessary briefings on Due Process and Equal Protection issues which were never raised in the state courts.[8]

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[8] It should be noted that the general practice of Minnesota courts is to not consider issues raised for the first time on appeal. Matter of Welfare of K.T., 327 N.W.2d 13, 16 (Minn. 1982); Krueger v. State Farm Fire & Cas. Co., 510 N.W.2d 204, 209 (Minn. Ct. App. 1993) (scope of appellate review limited to issues decided by trial court); accord, McIntire v. State, 458 N.W.2d 714, 717 n.2, (Minn. Ct. App. 1990), cert. den., 498 U.S. 1090 (1991), reh. den., 499 U.S. 970 (1991).

Because review of the Due Process and Equal Protection issues presented for the first time would violate the principle of comity and presents practical barriers such as lack of record or of a potentially independent and adequate state grounds for decision, this Court should simply decline to consider the Due Process and Equal Protection arguments asserted in the Petition. Additional support for this request is supplied by Brockett v. Spokane Arcades, 472 U.S. 491, 105 S.Ct. 2794 (1985)(Supreme Court must never anticipate a question of constitutional law and never formulate rule of law broader than required by the precise facts before it).

IV. THE DUE PROCESS AND EQUAL PROTECTION CLAIMS RAISED SHOULD BE SUMMARILY DISMISSED ON THE STRENGTH OF FIRST AMENDMENT PROTECTION AGAINST CIVIL INTRUSION INTO CHURCH GOVERNANCE

Should this Court review the Due Process and Equal Protection arguments that not been considered by the lower court, the decisions in Milivojevich, Knuth v. Lutheran Church, Missouri Synod, 643 F.Supp 444, 447-48 (D. Kan. 1986), and Nunn v. Black, 506 F.Supp. 444, (W.D.Va. 1981), aff'd, 661 F.2d 925 (4th Cir. 1981), cert. den. 454 U.S. 1146 (1982) should be dispositive.

In Knuth, the plaintiff was removed from the Missouri Synod's clergy roster and was unsuccessful in his attempts to regain that status. 643 F.Supp. at 445-446. He brought suit and alleged that the Synod had breached certain contractual obligations, among other theories. His claims were based on rights allegedly found within the Synod Constitution, its articles of incorporation, bylaws, official publications, handbooks and rules of procedure. Id. at 447.

The court dismissed the lawsuit and held there was no subject matter jurisdiction to review the church's decision

because that review required impermissible involvement into the church canon and ecclesiastical law. The Knuth court held:

> In construing these religious documents and doctrines, the court would usurp the rights of the highest religious bodies to construe their own church laws. . . . **'Due process' and 'fundamental fairness' are constitutional and secular concepts that are not relevant to ecclesiastical decisions** which by their religious nature are reached and accepted as matters of faith. . . . Plaintiff's claims relate to his rights as a minister and former minister which go to the heart of eternal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law.

Id. at 448 (citations and internal quotes omitted).

Similarly, the decision in Nunn v. Black demonstrates that these claims should be dismissed. In Nunn, the court was presented with issues surrounding congregation members expulsions from a church. 506 F.Supp. at 448. In its review of the case, the Nunn court noted there was no state action to prompt a due process analysis. Id. at 448-449. The court followed the decision in Milivojevich by holding that constitutional concepts such as due process "involving secular notions of `fundamental fairness'...are...hardly relevant to such matters of ecclesiastical cognizance." Id. at 448; see Milivojevich, 426 U.S. at 715.

Here, as in the cases cited above, there is absolutely no state action to trigger analysis under Due Process or Equal

Protection. The cases cited by Olson are distinct both factually and procedurally from the matter before this Court.[9]

Based upon the reasoning and rationale of Milivojevich, Knuth and Nunn, the Due Process and Equal Protection issues raised by Olson must yield to the necessarily fierce protections and limitations of the First Amendment.

CONCLUSION

For the foregoing reasons, Respondent Luther Memorial Church asks this Court to deny the petition for writ of certiorari from the well-reasoned state decision below.

DATED: August 30, 1996

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[9] For example, Olson cites Logan v. Zimmerman, 455 U.S. 422 (1982), for the proposition that he has a property interest triggering Due Process analysis. In Logan, the access to the court system was created by the Illinois Fair Employment Practices Act. Id. at 422-23. Here, there is no such "property interest" to court access. Further, the Equal Protection scrutiny in Broddie v. Connecticut, 401 U.S. 371 (1971), was partly due to the state's monopolization of the means of resolving the issues addressed regarding divorce and marriage. 401 U.S. at 376-377. Here, Olson refused other means available for resolution.